Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

CYNTHIA DILLON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. (the "FMLA"), impose strict liability on an employer who "bent over backwards" to invite and evaluate an employee's claim for leave where:

(a) the District Court allowed the jury to consider evidence about the employee's qualification for FMLA leave even though the employer had no way of knowing about it while its decision was under advisement because the employee elected to withhold that information from the employer;

(b) the actual justifications for leave which the employee claimed while the employer's leave decision was under advisement are demonstrably false or otherwise insufficient as a matter of law; and

(c) the District Court instructed the jury to consider an alternative theory to justify the employee's leave which the employee had never claimed (and the employer had no way of knowing) before suit?

PARTIES TO THE PROCEEDINGS

Petitioner Maryland-National Capital Park and Planning Commission (the "Commission") is a public body corporate and agency of the State of Maryland. Respondent Cynthia Dillon ("Dillon") is an individual.

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PETITION FOR WRIT OF *CERTIORARI*

The Maryland-National Capital Park and Planning Commission respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *per curiam* panel opinion of the United States Court of Appeals for the Fourth Circuit was filed on December 11, 2007, affirming various trial court rulings. The opinion is published unofficially at 2007 WL 4322575 and reproduced at App. A. The Fourth Circuit denied a timely petition for rehearing on January 16, 2008. This opinion is reproduced at App. H. An opinion of the United States District Court for the District of Maryland issued at the pre-trial stage on August 18, 2005, is published as *Dillon v. The Maryland-National Capital Park and Planning Commission*, 382 F. Supp. 2d 777 (D.Md. 2005) and reproduced at App. G. A later opinion of the District Court issued on October 27, 2006, to deny certain post-trial motions is published unofficially at 2006 WL 5157076 and reproduced at App. D.

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit filed its panel decision on December 11, 2007, and denied a timely petition for rehearing on January 16, 2008. This honorable Court has jurisdiction over this petition filed timely under 28 U.S.C. § 1254 and in accordance with Supreme Court Rule 13.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions listed below are reproduced in the Appendix at I.

29 U.S.C. § 2601 the Family Medical Leave Act
29 U.S.C. § 2611
29 U.S.C. § 2612
29 U.S.C. § 2613
29 U.S.C. § 2617
29 C.F.R. § 825.116(a)
29 C.F.R. § 825.116(b)
29 C.F.R. § 825.208(a)(1) [renumbered 29 C.F.R. § 825.301]
29 C.F.R. § 825.302(a)
29 C.F.R. § 825.302(b)
29 C.F.R. § 825.303(a)
29 C.F.R. § 825.305
29 C.F.R. § 825.307

STATEMENT OF THE CASE

A. The Missing Work Week and Claim for Leave

On January 17, 2003, Patricia Barney signed a letter on behalf of the Commission, a public agency of the State of Maryland, to finalize Respondent Cynthia Dillon's dismissal from employment.

Barney was the Commission's Secretary-Treasurer and responsible for overseeing the finance department where Dillon worked in the office that handles the entire agency's payroll. In her letter, Barney noted that Dillon had been absent from the workplace without leave over the last full work week of 2002 –

the week ending between the Christmas and New Year holidays on Friday, December 27, 2002. (For the sake of convenient reference in this petition, that critical week is denominated as the "Missing Work Week.")

Before the dismissal, Dillon claimed that she was entitled to leave for the Missing Work Week because she was absent in order to attend to her grandmother who lived in Jamaica where she suffered a mild stroke on December 9, 2002. According to The Honorable Deborah K. Chasanow's summary judgment ruling that no liquidated damages would lie in this case, Barney "had a right to be skeptical" about Dillon's FMLA claim, but nevertheless "bent over backwards to give [respondent's claim for FMLA coverage] every consideration." 382 F. Supp. 2d at 792.

B. Reasons for Skepticism

Indeed, as the trial court indicated, Barney was aware of several reasons to be skeptical about Dillon's FMLA claim. First, Dillon made her request for leave to attend to her grandmother while she was vacationing in Jamaica with her family. According to Dillon, shortly after arriving to vacation in Jamaica with her family on December 12, 2002, she learned about her grandmother's health episode. Dillon waited until December 19, 2002 – the eve before her vacation leave would expire – before she requested the extra leave needed to cover the Missing Work Week.

Second, although it was the first request that she tied to caring for her grandmother, Dillon's December 19th request from Jamaica was actually the *third* time she applied for leave covering the Missing Work Week.

Well before she traveled to Jamaica for her family vacation, Dillon twice requested leave for the same week, but Barney and Dillon's supervisor were unwilling to extend Dillon's leave for a full three weeks because the year-end is particularly busy in the Commission's small payroll office. Instead, Barney offered Dillon the option of taking three weeks during another time of the year, or otherwise taking a two-week vacation that December. After Barney explained for a second time on November 7, 2002, why she would not approve three weeks of leave, Dillon applied for the two weeks in December that would not include the Missing Work Week, and which required her to return for work on December 23, 2002.

Third, Barney also knew from their second discussion on November 7, 2002, Dillon expressly threatened insubordination at one point by telling Barney that she would be absent for the Missing Work Week whether or not leave was approved. After Barney warned that her failure to report under those circumstances would result in dismissal, Dillon seemed to relent and applied for the two weeks in December which Barney promptly approved.

Finally, Barney had reason to be skeptical about Dillon's claim because Dillon told Barney months earlier that she made her travel arrangements and purchased all the airline tickets for her family *before* ever applying for the vacation leave. In their earlier discussions, Dillon expressed alarm that she would suffer financially unless Barney approved her leave for the Missing Work Week because the airlines would impose penalties if she made any changes to her travel itinerary.

C. Dillon's Explanation Before Petitioner's Decision: The Employee Notice

Notwithstanding a handful of palpable reasons for a jaundiced view of Dillon's third request for leave during the Missing Work Week, by the time Barney signed the letter on January 17, 2003, to deny the claim and fire her, Dillon had the benefit of no less than five unfettered opportunities to provide an adequate explanation of the basis for her request. Presumably, these five chances for Dillon to explain are collectively what led Judge Chasanow to decide that Petitioner "bent over backwards to give [respondent's claim for FMLA coverage] every consideration." 382 F. Supp. 2d at 792.

Dillon made her initial contact in an email sent to Barney on December 19, 2002, after normal work hours. Dillon states, in relevant part, "I am requesting an extension of sick leave because my grandma is very ill and I am in the process of finding a home for her." Barney answered Dillon's email the next morning in kind, and reminded her about their conversation during the previous month when they discussed the likely consequences of Dillon's failure to return to work on time. Barney closes by writing: "I am truly sorry that I cannot approved [sic] your request."

On December 23, 2002, the day she was due back to work in the payroll office, Dillon was still in Jamaica and responded with her second email to Barney. Among other things, Dillon claims for the first time in this email that her grandmother had "raised" her. Barney responded to Dillon by email almost immediately as follows:

> In our meeting you stated that you were going to take your requested annual leave even if it wasn't approved. I stated that you would be absent without leave and lose your job. I was very concerned. Subsequently, you agreed to the approved days. In that meeting you also stated that you were close to your grandmother, but at no time did you indicate that she had raised you. I believe that the Merit Rules provide for sick leave up to 80 hours for immediate family described as a spouse, a child or parents. I do not know if this could be applied to your grandmother, if she raised you and your parents did not. You may wish to contact the Personnel Office to determine that answer...

In her next communication to Barney some five days later, Dillon seems to hedge on whether her grandmother actually "raised" her, stating: "And yes I grew up with my grandmother."

Barney formally notified Dillon by letter dated January 3, 2003, that she intended to dismiss her from employment for several reasons relating to the fact that Dillon failed to return to work on December 23 as they discussed, and was therefore absent during the Missing Work Week without approved leave. In the letter, Barney provided Dillon another opportunity to justify her leave, and invites her to follow the Commission's FMLA evaluation procedures. The letter instructs as follows:

> [I]f you contend that your absence is covered for any reason under the Family and Medical Leave

> Act, you should submit all of the forms that I have enclosed. In this case you should also explain in reasonable detail whether and, if so, when and how your grandmother actually stood in the role of your parent during childhood.

Dillon eventually complied with Barney's request to provide the required forms, including a medical certification completed in Jamaica by a doctor who apparently treated her grandmother. According to the medical certification and the testimony adduced at trial by Dr. Sandra Nesbeth, Dillon's grandmother suffered a "TIA – known as a "Transient Ischemic Attack" or more simply a "small stroke." The certification further sets forth that Cynthia Dillon was needed to care for her grandmother in order "to find a caregiver" and "found a B. Ellis to look after her . . ."

Although Petitioner had no basis that was known at the time to contest whether Dillon's grandmother experienced a medical condition that could trigger coverage under the FMLA over the relevant time period, Petitioner was openly exploring whether her grandmother ever stood *in loco parentis* to the granddaughter, such that Dillon's absence from work to provide appropriate care would qualify for the entitlement to leave. Dillon replied to Barney on this score by stating, in pertinent part, as follows:

> I am the first grandchild for Ms. Lowe [her grandmother]. During my childhood my grandmother was always instrumental in my life. My mother was around but I was always with my grandmother... My grandmother fed me, take me to church on Saturdays, and comb

my hairs, as I stated she played a major role in my upbringing.

On January 10, 2003, Barney extended to Dillon a final opportunity to meet and discuss the pending decision about terminating the employment relationship. Once again, when Barney inquired, Dillon seemed to retreat even further from a parental-sort of relation, stating only that in her formative years "everyone helped everyone" and that "she was not trying to use FMLA," she just wanted to try to find another place for her grandmother and aunt to live.

During this meeting, Barney also attempted to confirm whether Dillon ever attempted to change her travel plans, which she needed to do in order to comply with the period of approved leave and report back to work on December 23, 2002. As Barney saw it, if Dillon had made no effort to comply with the leave actually approved, that failure would amount to insubordination in ignoring a reasonable and very clear directive. Dillon could never produce any evidence to show that she even attempted to change her travel plans before leaving for vacation.

D. Lower Court Proceedings

Dillon filed her complaint in the United States District Court for the District of Maryland on March 25, 2004, alleging that the Commission interfered with her entitlement to leave under the FMLA, that her termination was therefore unlawful, and demanded a jury trial. The parties filed cross-motions for summary judgment.

On August 18, 2005, Judge Chasanow denied Dillon's motion for summary judgment, but granted partial summary judgment in favor of the Commission to foreclose Dillon's recovery for liquidated damages only. On January 3, 2006, the Commission filed a motion in limine seeking to prevent the District Court from admitting certain evidence that Dillon failed to provide before January 17, 2003, the day Barney decided to terminate Dillon's employment. The District Court granted the Commission's motion in part, and denied it in part.

The parties tried the case before a jury between March 21 and 23, 2006. The Commission moved for judgment as a matter of law at the close of Dillon's case and after all the evidence was before the jury. On March 23, 2006, the jury returned a verdict in favor of Dillon and awarded $76,914.00, and on March 31, 2006, the District Court entered judgment.

On April 3, 2006, the Commission filed a second motion for judgment as a matter of law, motion for a new trial, and motion to alter or amend judgment. On October 27, 2006, the District Court issued an order denying the Commission's motion for judgment as a matter of law and motion for a new trial, and held the motion to alter or amend in abeyance.

After denying the Commission's motion for judgment as a matter of law and for new trial, on November 9, 2006, the District Court granted the Commission's motion to alter or amend judgment by reducing the former judgment of $76,914.00 in lost wages to $61,625.78. On November 30, 2006, the Commission filed its timely notice of appeal to the

United States Court of Appeals for the Fourth Circuit to challenge the trial court's denial of the Commission's motions for judgment as a matter of law and for new trial. On December 13, 2006, Dillon filed a timely notice of cross-appeal. The District Court entered a Final Amended Order on March 9, 2007, disposing of remaining issues at that Court by awarding attorneys' fees in the amount of $60,098.00, reducing the backpay award to $44,494.38 and awarding prejudgment interest of $6,742.77.

On December 11, 2007, the U.S. Court of Appeals for the Fourth Circuit affirmed the decision of the District Court in an opinion that largely adopted the reasoning of the District Court. The Commission filed a Petition for Rehearing on December 26, 2007, which was denied on January 15, 2008, by order entered January 16, 2008.

REASONS FOR GRANTING THE PETITION

This case revolves around information that Dillon withheld from the Commission even as Barney was struggling diligently during January of 2003 to figure out whether Dillon qualified for FMLA leave. Although Judge Chasasnow seemed to correctly apprehend the evidentiary and substantive legal difficulties presented under these circumstances,[1] the

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[1] In the opinion granting partial summary judgment in favor of the Petitioner, Judge Chasanow highlights that "a potentially critical question in this case is whether Plaintiff may support her claim with evidence not shared with her employer." 382 F. Supp. 2d at 786.

District Court nevertheless allowed the jury to consider certain evidence that Dillon deliberately withheld from her employer, and the jury ultimately decided in her favor over the Commission's repeated objections. The error endorsed now by the Fourth Circuit is especially troubling because, as Judge Chasanow found, the Commission had "bent over backwards to give [respondent's claim for FMLA coverage] every consideration." 382 F. Supp. 2d at 792.

I. EVEN EMPLOYERS WHO "BEN[D] OVER BACKWARDS" FOR THEIR EMPLOYEES CANNOT COMPLY WITH THE FMLA IF THE FOURTH CIRCUIT ALLOWS JURIES TO CONSIDER NEW EVIDENCE OR ALTERNATIVE THEORIES ANNOUNCED ONLY AT TRIAL WHERE THE CLAIMANT-EMPLOYEE WITHHOLDS THE SAME INFORMATION FROM THE EMPLOYER BEFORE INITIATING SUIT.

A. The Importance of Being Noticed

Congress embedded a collection of mutual notice requirements into the statutory scheme of the FMLA and considered those requirements to be "extensive" when taken up on a collective basis. P.L. 103-3, Family and Medical Leave Act of 1993, H.R. Rep. No. 103-8(I), at 38-39; S. Rep. No. 103-3, at 25. *See* 29 U.S.C. § 2612(e). Likewise, notice requirements contained in the statute are also the lynchpin for a number of regulations promulgated by the Department of Labor to implement the FMLA. See 29 C.F.R. § 825.303(a) (Where need for leave is not foreseeable,

employee should give notice to employer as soon as practicable.); 29 C.F.R. § 825.302(a) (If 30 days notice is not practicable, notice must be given as soon as practicable); and 29 C.F.R. § 825.302(b) ("As soon as practicable" means as soon as both possible and practical; ordinarily requiring verbal notification in one or two business days.)[2] By enabling those requirements, Congress struck a critical balance between the employer's need for productivity and the employee's entitlement to leave. *See e.g.* P.L. 103-3, Family and Medical Leave Act of 1993, H.R. Rep. No. 103-8(I), at 87. (comment reported that "employee must give reasonable notice of their intent to take leave so as not to unduly disrupt an employer's operations").

But even with some sort of notice by the employee, an employer might still be unsure whether a request for leave is covered by FMLA. The statute accordingly empowers employers to solicit from employees a medical certification if, for example, that becomes necessary to evaluate whether a particular medical condition is covered, and the regulations even construct a rather elaborate procedure for resolving disputes over the content of various medical certifications. 29 U.S.C. § 2613(c) and (d); and 29 C.F.R. § 825.307. Congress recognized that employers

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[2] The Commission argued below that Dillon's notice was given untimely as a matter of law because she found out about her grandmother's health episode on December 12, 2002, the day she arrived for vacation in Jamaica. Dillon did not attempt to contact the Commission until a full week later, after the close of business on December 19, 2002, the eve of the last regular work day when her approved leave would expire.

would sometimes need to evaluate whether a particular medical situation qualifies for leave and sought to provide tools needed to make this evaluation successfully. Similarly, the Department of Labor regulations anticipate that employers might sometimes need to evaluate whether an employee has requested leave "in order to care for" another person who is covered by the FMLA, and these regulations entitle the employer to request information and documents toward that end. 29 C.F.R. § 825.305(a).

Congress also clearly intended for the FMLA to attach liability for an employer who believes – albeit mistakenly – that an employee does not qualify for leave. 29 U.S.C. § 2617(a)(1)(A)(iii). *See also generally* P.L. 103, Family and Medical Leave Act of 1993, S. Rep. No. 103-3, at 3. ("[I]f the employer proves to the satisfaction of the court that it acted in good faith and had reasonable grounds to believe that its acts or omissions were not a violation, the court may, in its discretion, limit the employer's liability to the actual damages.")

Meanwhile, a number of Circuit Courts have long held now that employers carry the affirmative obligation to inquire and evaluate whether an employee's request for leave is "possibly" covered by FMLA, even if the employee does not assert coverage or leaves it unclear at the time they make a request for leave. *See e.g. Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997) (employee provided employer with "sufficient information" about his medical condition to "put [the employer] on notice" of a "possible FMLA leave situation"); and *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995)

(notice by employee that leave was needed as a result of complications from toe surgery obligated employer to provide leave.)

The singular purpose of the FMLA's employee notice requirements described above, along with the employer's entitlement to relevant information about qualification and the legal obligation to solicit information to determine eligibility, is to afford the employer a reasonable opportunity to comply with the law. That purpose is confounded, however, unless employers are only legally responsible to "get it right" based on the information that is actually known, or otherwise should be known after exercising reasonable diligence, at the time when it makes a decision under FMLA. *Cf. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) (ultimate purpose of private cause of action to enforce the Clean Water Act is to offer violators a constructive opportunity to comply with statutory requirements). Any other rule of law would make compliance with the statute more or less random, allowing employees to "mousetrap their employers by requesting FMLA leave on patently insufficient grounds and then after leave is denied obtaining a doctor's note that indicates sufficient ground existed, though they were never communicated to the employer." *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir. 2004). Congress could never have intended this result.

B. Missing Pieces: Information Dillon Withheld From Barney

1. Dillon Failed to Disclose She Was Born To An Unliberated Minor: Making Her Grandmother The Head of Household Who Stood *In Loco Parentis* During Dillon's Infancy.

Despite Barney's repeated entreaties seeking a complete understanding from Dillon about the relationship with her grandmother, Dillon withheld the full story until well after filing suit. While Barney was in the process of making her decision – when it really mattered – Dillon decided not to disclose that her mother was only 16 years old and not liberated from her grandmother's home in Jamaica when Dillon was born. Dillon's reasons for deciding to withhold those details from Barney may be worthy of great compassion and understandable on some level, but the Commission was absolutely *entitled* to have notice of that critical information before acting if it could later be used to support Dillon's claim that the Commission interfered with her qualification for leave. If Dillon chose to withhold that information from the Commission while its decision was pending, that evidence is irrelevant to support Dillon's claim at trial that the Commission interfered with her FMLA rights, and the trial court erred by admitting it.

Viewed according to its plain meaning, the FMLA does not apply when a granddaughter claims a need for leave in order to care for a grandparent – in Dillon's situation. Rather, as Barney pointed out when she invited Dillon to provide details about her

grandmother, the FMLA applies to these relationships only if the grandparent stood *in loco parentis* to the grandchild at an appropriate time, which then sweeps the grandparent into the statutory definition of a "parent." 29 U.S.C. § 2611(7) ("The term 'parent' means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter."). In short, Congress has imported into the FMLA a very fact-driven, common law threshold to determine whether Dillon's claim would be covered.[3]

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[3] For example, in a decision by the Sixth Circuit which the District Court cited in deciding the case below, the term "*in loco parentis*" is described as follows:

> [A]ccording to its generally accepted common law meaning, [the term] refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties... It clearly embodies more than furnishing material help to a close relative who is in need. One may be willing to furnish needed assistance to such a relative, even over an indefinite period of time, without being willing at the same time to assume the legal obligation of a parent. Due to the obligations and rights that arise out of such a relationship, the assumption of the relationship does not arise by chance, but is the result of intention.

382 F. Supp. 2d at 786, *citing Niewiadomski v. United States*, 159 F.2d 683, 686 (6th Cir.1947), cert. denied, 331 U.S. 850, 67 S. Ct. 1730, 91 L. Ed. 1859 (1947) (internal citations omitted).

Precisely because each request under the FMLA requires an intense and fact-driven evaluation, sometimes involving very intimate personal affairs, it is fundamentally unfair to the employer for a trial court to allow an employee to tell their employer one story in order to qualify for the leave, tell a jury another story, and then hold the employer legally responsible based on the second story it never heard until litigation ensued. As the District Court correctly found, the Commission "gave [Dillon] repeated opportunities to clarify her relationship with her grandmother in order to demonstrate her entitlement to [FMLA leave]." 382 F. Supp. 2d at 792. The Fourth Circuit is in accord on this point, recognizing the "Commission considered the possibility that Dillon's request for leave constituted a request for FMLA leave and gave her several opportunities to clarify her relationship with her grandmother," leading the appeals court to conclude that "the Commission reasonably believed Dillon's leave did not qualify for FMLA protection." App. A., pg. 5.

But the District Court should have excluded as irrelevant any evidence about her relationship with her grandmother that Dillon possessed and withheld from the Commission, particularly since the Commission exercised diligence in its attempts to extract information that was readily available only to Dillon. The Fourth Circuit erred by affirming that fundamental unfairness in the proceedings below.

So the lower courts effectively gave Dillon free reign to tell the jury about how her grandmother functioned as head of the household during her infancy and at a time when Dillon's mother was still a minor.

Indeed, in her post-trial argument to support the jury's verdict on whether her grandmother stood *in loco parentis*, Dillon resorts almost exclusively to information that she chose to withhold from Barney while the Commission was mulling her claim. Specifically, in response to the Commission's renewed motion for judgment as a matter of law, Dillon argued:

> Plaintiff's mother was only 16 years old when she became pregnant.... The fact that Plaintiff briefly lived with her father when she was four years old for a year, and spent a couple if years living with her mother when she was attending high school does not change Plaintiff's grandmother role as her parent. The important undisputed fact it that is was the grandmother who actually raised her while Plaintiff's mother attempted to find work to assist with finances in the household. It was Plaintiff's grandmother who financially provided for her, gave her love and attention as she was growing up and spent more time with her then either one of the parents, and was there for her even when her own mother rejected her because of her early pregnancy.

Dillon's second story may be compelling, but she didn't tell it in time for the Commission to consider those facts in relation to her December 2002 leave request. Instead, while the Commission was trying to reckon whether and how the FMLA might fit her situation, Dillon offered Barney a variety of conflicting formulations to describe the nature of her relationship, none of which could possibly be taken to mean that her grandmother was the head of her household during

infancy or that her mother was a minor when Dillon was born. The relationship and activities Dillon disclosed before her termination are indicative of a typical of relationship between a grandchild and grandmother, but cannot make a case that her grandmother stood in place of her mother for the purpose of the FMLA. The District Court's decision to admit Dillon's second story was plainly in error and fundamentally unfair to the Commission because this lays exactly the sort of "mousetrap by notice" about which the Seventh Circuit worried in the *Aubuchon* case cited above.

2. Dillon's Medical Certification Was Demonstrably False Because No Need Existed For Her To Find "B. Ellis."

Beyond her failure to provide the whole story about relevant family relationships, the form that Dillon actually tendered to support her leave request fabricates a factual predicate indispensable for her FMLA request to survive. Specifically, before trial, Dillon's claim that she was entitled to leave rested entirely on the medical certification form written by Dr. Nesbeth which reports, in relevant part, that Dillon needed leave to care for her grandmother in order "to find a caregiver" and that she "found a B. Ellis to look after her . . . ." During trial, Dr. Nesbeth made it clear that she did not complete that portion of the form based on her personal knowledge. As a matter of law, if Dillon was not actually needed to find caregiver "B. Ellis" then, contrary to what the medical certification form reports, the whole basis of Dillon's claim for FMLA coverage would crumble.

Before Dillon filed suit in this case, and obviously before Barney decided on January 17, 2003, to dismiss her for insubordination, the Commission had no reason to question or challenge the content of Dr. Nesbeth's certificate. As it turns out, however, the Commission learned through discovery in this case that Dillon was not needed to find "B. Ellis" as a caregiver for her grandmother; that is, because "B. Ellis" is actually Berthlyn Ellis, Dillon's aunt and her grandmother's daughter. Dillon admits that Berthlyn Ellis lived with and cared for her grandmother both before her mild stroke and long after Dillon left Jamaica after the Missing Work Week. In other words, the medical certification does not support Dillon's entitlement to leave under the FMLA because the caregiver she claims to have "found" was already in place, so Dillon must identify some other basis in FMLA to sustain her claim otherwise.

Looking at these facts, the District Court concluded that a reasonable jury could have found that Dillon did not work any "deception" on Dr. Nesbeth with regard to the statements contained in the medical certification about finding "B. Ellis" as "caregiver." But whether Dillon set out to deceive Dr. Nesbeth is of no moment under the FMLA. The only thing that matters is what Dillon intended to communicate to her employer and, on this score, Dillon specifically accepted responsibility at trial for submitting the medical certification. Dillon herself submitted the medical certification form containing information which, for whatever reason, is clearly false and not based on Dr. Nesbeth's personal knowledge. The fact that this information is patently false eliminates the basis Dillon originally claimed to support her leave

request under FMLA because, contrary to what she claimed during January of 2003, no leave was necessary to "find" a caregiver who already existed.

C. Dillon's New FMLA Claim At Trial Was That She "Needed To Relieve" the Same Caregiver As The One She Originally Claimed That She "Needed To Find"

Dillon's desire to posture her claim on a "need to relieve" basis amounts to a maddening attempt to have it both ways. On the one hand, her claim before trial is based on a need to "find" a caregiver and, on the other hand, her new claim at trial is based on a need to "relieve" the very same person she claims to have later "found."[4] But neither the District Court nor the Fourth Circuit have elected to step in and prevent this manifest injustice. Instead, in an inestimable error,

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[4] Early on in this case, Dillon mentioned obliquely to Barney that she needed leave during the Missing Work Week in order to place her grandmother in an assisted living facility, but she ultimately abandoned that position during depositions taken under oath. 29 C.F.R. § 825.116(a)-(b) (leave needed "in order to care for" may include "situations where the employee may be needed to fill in for others who are caring for a family member or to make arrangements for changes in care, such as transfer to a nursing home.") Rather, Dillon testified that she merely wanted to find a better house for grandmother, even though her grandmother ultimately remained in the same household with her daughter, Berthlyn Ellis, for several years after Dillon's Missing Work Week in Jamaica. Thus, the only reason legally available to support her claim by the time trial began was that her leave was needed to find "B. Ellis" as a caregiver.

the District Court actually instructed the jury on the issue.

Perhaps because of the weakness so apparent in marshalling a claim based solely on her asserted need to "find" the very same aunt who was already a caregiver for her grandmother, Dillon took a brand new tack at trial in an effort to justify her claim for FMLA coverage for the Missing Work Week. Specifically, over the Commission's objections raised both *in limine* and at trial, Dillon was allowed to put evidence on that her leave was needed in order to relieve her aunt, Berthlyn Ellis, who had been providing care for her mother since the health episode at issue.[5] The lower court should never have permitted Dillon to introduce her "need to relieve" evidence because she did not make Barney aware of it before January 17, 2002 – while her FMLA leave decision was still under advisement. (Of course, the obvious irony is that Dillon could not possibly have provided that information to Barney because it would conflict squarely with the information contained in the medical certification form she submitted.)

The Commission objected to introducing any new evidence proffered by Dillon under a whole new theory that she needed "to relieve" Berthlyn Ellis. The trial court wrestled with the Commission's objection over a bench conference that included the following exchange:

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[5] 29 C.F.R. § 825.116(a)-(b) (FMLA covers leave needed in order to care for qualified persons in "situations where the employee may be needed to fill in for others who are caring for a family member ...")

The Court

This is, in essence, a two-pronged case. The first part is she has to prove that she's [Dillon] eligible for the statute, that there's a medical problem that is the in loco parentis.

Even if you [Dillon] prove all of that, you've then got to prove she told the Commission enough so that the Commission can, you know, act upon it, and there's an instruction.

I think, that the Commission is judged on what they were told, and if the Commission doesn't know any of this, they can't be held liable.

This may go to whether a caregiver is needed, but it doesn't go – if the Commission doesn't get told this, you can't prove it. It can't be held responsible.

The Commission (Mr. Dickerson)

I am intending to argue it, but I just believe it's unfairly prejudicial for this kind of – to kind of leak into it because, I mean, by this theory, there could be a new theory today about why she was entitled to FML [sic] leave, and what would be the relevance of that?

The Court

I understand that position. There's not a lot of authority on this, so we're doing our best - -

The Commission (Mr. Dickerson)

I understand.

The Court

- - to try to work through this, and this dichotomy approach that we're using is what I decided based upon the reading of the case law that we have, and we're going to have specific findings on the jury verdict sheet on these elements.

Ultimately, the District Court instructed the jury to consider Dillon's trial-day theory – that her leave might qualify under FMLA in order "to relieve" her aunt – along with all the improper evidence offered and admitted during trial to support it. In denying the Commission's post-trial motion to challenge those rulings, the trial court reasons as follows:

> Jury Instruction No. 22, which defines the phrase, "needed to care for," provides the following guidance relevant to [the Commission's objections]:
>
> > The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member, ***or*** to make arrangements for changes in care, such as transfer to a nursing home.
>
> [The Commission] focuses exclusive (sic) on the first clause (where the employee may be needed

> to fill in for others who are caring the family member). Based on the evidence presented and this Court's instructions prohibiting the consideration of post-January 17, 2003 information, a reasonable jury could find Ms. Dillon was needed to care for her grandmother because she was making arrangements for changes in care (the second clause).

App. D, at page 54. (Emphasis in original).

The trial court's instruction to the jury is utterly improper because it mixes apples and oranges. No fair interpretation of the FMLA statute and regulations would allow a construction that elevates Dillon's desire to find a better home for her grandmother onto the same footing as "making arrangements for changes in care, such as transfer to a nursing home." App. D. *See* 29 C.F.R. § 825.116(b). Therefore, a reasonable jury cannot find that searching for a more comfortable home amounts to a "change in care" for a qualifying medical condition unless some claim or evidence is offered to make that connection. In this case, no connection is possible.

Even though the Commission expressly entreated the District Court to avoid an improper jury charge amounting to a "heads I win, tails you lose" choice, the Fourth Circuit declined to address this issue at all in either its *per curiam* opinion upholding the trial court or its decision to deny petitioner's request for rehearing. Dillon has been allowed in this case to whipsaw the Commission into liability, notwithstanding that Judge Chasanow believed the

Commission "bent over backwards" to consider her claim before making its decision under the FMLA.

II. THE UNLIMITED AND UNCERTAIN LEGAL OBLIGATIONS THE FOURTH CIRCUIT WOULD SADDLE ON EMPLOYERS UNDER FMLA IS AT ODDS WITH DUE PROCESS AND THE DECISIONS OF OTHER CIRCUITS.

Congress expressed its deliberate policy decision by enacting the FMLA to "balance the demands of the workplace with the needs of families," and by orienting the new statutory obligations "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). The statute simply cannot be stretched far enough to cover Dillon's claim for leave without running afoul of a "legitimate interest of employers" all over this Nation. Every employer has a compelling interest in preserving the opportunity to exercise due diligence in order to enjoy a fair chance of achieving compliance with their readily-known known legal and regulatory obligations. As the Eighth Circuit observed, an employer is not strictly liable any time it interferes with an employee's FMLA leave, but is only liable if that interference is unlawful. *See, e.g., Throneberry v. McGehee Desha County Hospital*, 403 F.3d 972, 981 (8th Cir. 2005).

Although a number of circuit court decisions do hold that an employer may be on "inquiry notice" that requires them to ask pertinent questions when an employee reasonably implies that leave is needed for an FMLA reason, the Commission can find no instance where a court holds the employer liable on the basis of an inquiry notice or interfering with an employee's

FMLA rights if the employee deliberately withholds from the employer or deliberately misleads the employer about the reasons leave is needed in the first place. *See Price,* 117 F.3d at 1026, and *Manuel*, 66 F.3d at 764, cited above.

To the contrary, in *Gay v. Gilman Paper Company*, 125 F.3d 1432 (11th Cir. 1997), employee Queen Ester Gay suffered a nervous breakdown that required her hospitalization and undoubtedly would have qualified as a medical condition that triggers an FMLA leave entitlement. Even though, at Gay's behest, her husband and sons informed the employer that she was in the hospital and undergoing tests, the Eleventh Circuit excused the employer from liability after the company fired Gay based upon her "extended failure to report off, or explain absences." The Circuit Court in *Gay* reasoned:

> [I]n [Gay's case for FMLA protection], not only was there a dearth of information provided [to the employer], but the information that was provided was false. Gay's husband informed her supervisor that Gay was having some tests run on the first day of her absence from work. When questioned by Gay's supervisor about his wife's condition, Gay's husband deliberately withheld information concerning the true nature of her condition and instructed his sons to do the same. Under these circumstances, the burden to request further information never shifted to [the employer] because [the employer] could not reasonably be expected to conclude that Gay's

> absence might have qualified for treatment under the FMLA.

Id., at 1436.

The compelling principle framed by the Eleventh Circuit in the *Gay* decision is that no employee can put an employer on inquiry notice under the FMLA if they deliberately withhold information or otherwise feed their employer with information that is false. The Fourth Circuit's decision in favor of Dillon is squarely at odds with that principle and this Court should step in to clarify.

The other circuits recognize comparable common sense limits on the employer's obligation after inquiry notice. For example, after Wal-Mart fired an employee who never gave a reasonably detailed notice concerning the pain in her side, the Fifth Circuit observed that "[w]hile an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant." *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980 (5th Cir. 1998), cert. denied, 525 U.S. 826, 119 S. Ct. 72, 142 L. Ed. 2d. 57 (1998), *quoting Johnson v. Primerica*, 1996 WL 34148, at 5 (S.D.N.Y. 1996). Likewise, the Seventh Circuit recognized the policy of fairness and balance in *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir. 2004), when it reasoned that the FMLA should not be read to encourage employees "to mousetrap their employers by requesting FMLA leave on patently insufficient grounds and then after leave is denied obtaining a doctor's note that indicates sufficient ground existed,

though they were never communicated to the employer."

The District Court on several occasions referred to the lack of developed case law interpreting the FMLA, particularly with regard to the procedural and substantive application of the statute and regulations. Like the District Court, every day employers must analyze similar issues and anticipate how they believe the previously described balancing of the statute will be interpreted. Without further guidance, employers like the Commission will be in the same position evaluating similar issues of entitlement to FMLA leave and what information can be used to satisfactorily demonstrate that entitlement.

In this case, the Fourth Circuit endorsed the District Court's charge holding the Commission accountable for not considering information that only Dillon enjoyed and after she decided to withhold it. Permitting reliance on this sort of information eviscerates the statutory requirement of sufficient notice and places employers in the untenable position of either having to grant leave not required by the known facts, or risking strict liability later because a trial court will not place limits on what facts are presented to a jury. Such an approach does not comply with the statute's stated purpose to carry out the Act "in a manner that accommodates the legitimate interest of employers."

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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